U.S. Department of Transportation
Office of the Secretary of Transportation

General Counsel

400 Seventh St., S.W.
Washington, D.C. 20590

April 1, 2005

Vernon A. Williams, Secretary
Surface Transportation Board
Suite 700
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: Motor Carrier Bureaus – Periodic Review Proceeding
Ex Parte No. 656

Dear Secretary Williams:

Pursuant to the Board's Notice in the above-referenced docket, 70 Fed.Reg. 3977 (January 27, 2005), enclosed herewith for filing is the original Reply Comments of the United States Department of Transportation in this proceeding.

Respectfully submitted,

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enclosure

Before the
Surface Transportation Board
Washington, D.C.

Motor Carrier Bureaus – Periodic Review Proceeding	)	Ex Parte No. 656

Reply Comments of the
United States Department of Transportation

This proceeding implements the statutory command that the Surface Transportation Board ("STB" or "Board") periodically review previously approved motor carrier agreements. 49 U.S.C. § 13703(c)(2); Decision served December 13, 2004. The record compiled to date in this process is a familiar one. Motor carriers, rate bureaus, and the freight classification bureau unanimously seek to extend the approval and antitrust immunity they have received in the past. Shippers and shipper associations uniformly oppose continued approval and immunity, and in the alternative seek additional conditions. The United States Department of Transportation ("DOT" or "Department") submits that the public interest is best served by terminating regulatory approval and immunity for the subject agreements.

The Agreements

There are two separate but related types of agreements at issue. The first establishes the means by which motor carriers, through regional rate bureaus, collectively set rates for different classes of freight ("class rates"). The second enables motor carriers, with shipper input, to group commodities into classes according to their transportation

characteristics. [1] The Board has described the "collective ratemaking system" produced by these two types of agreements as working

> in two steps. In the first step, commodities are classified (placed into groups) according to their transportation characteristics. In the second step, these classifications are used in conjunction with a rate schedule, which also may be set by a group of motor carriers, to determine the class rate to be charged for an individual shipment.

National Classification Committee – Agreement, Section 5a Application No. 61 (STB served November 21, 2001 ("2001 Classification Decision") at 3 (footnote omitted).

But matching a particular commodity in a given class with the rate for that class does not directly yield the rate shippers will pay. Rather, the rate so produced is more often a "baseline" or "benchmark" rate, which typically serves as a reference point for discounts offered by carriers, expressed in terms of a percentage of the class rate. See, generally, EC-MAC Motor Carriers Serv. Ass'n, 3 S.T.B. 926 (1998) ("1998 Decision"); EC-MAC Motor Carriers Serv. Ass'n, 4 S.T.B. 503 (2000) ("2000 Decision"). Many (but by no means all) shippers actually pay a discounted rate. Id.

Agreement Proponents

The bulk of the material in the record concerns collective ratemaking agreements. Motor carriers and rate bureaus all assert that these agreements warrant continued approval and antitrust immunity. In sum, these parties claim that collective "benchmark" rates facilitate price and service competition and result in reasonable rates, that shippers have not complained about the rates they pay, that small and medium size carriers depend

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[1]/ There are four such characteristics: density, stowability, handling, and liability. See Nat'l Classification Comm. – Agreement, 3 S.T.B. 917, 919 (1998) ("1998 Classification Decision"). There are hundreds of classes of commodities.

upon the efficiencies of the rate bureau system to compete against larger trucking firms, that the alternative to widely accepted "benchmark" rates and standard freight classifications would be an utterly unworkable and less competitive array of individually determined rates and classifications, and that collective class rates and freight classifications are critical to extensive joint line rate and service offerings. See, e.g., Comments of EC-MAC Carriers Service Association ("EC-MAC") at 3-5; Middlewest Motor Freight Bureau ("Middlewest") at 2-4 and Verified Statement ("VS") of Jeffrey D. Michalson at 3-4; Rocky Mountain Tariff Bureau ("Rocky Mountain") at 2, 5 and VS of Robert J. Haney at 4-5; Pacific Inland Tariff Bureau ("Pac Inland") at 3 and VS of Scott Edwards at 5-6; Household Goods Carriers' Bureau Committee ("HGCB") at 3.

The supporters of the classification agreements contend that because such agreements are grounded in the transportation characteristics of commodities they promote "equitable distribution of carriers' transportation burdens and fair treatment of shipper customers," that both carriers and shippers rely upon the resulting classifications because they have real value and enhance competition, and that the classification system is both flexible and reflective of shipper input. See Comments of National Motor Freight Traffic Association and National Classification Committee ("NMFTA/NCC") and VS of William W. Pugh at 2, 4, 6-8, 10-11.

Finally, these parties also insist that the antitrust immunity accorded ratemaking and classification agreements must be extended because the uncertainty and risk of exposure to antitrust law is such that motor carriers will simply not participate in discussions or agreements without protection from the STB. See Comments of Southern Motor Carriers Rate Conference ("Southern"), at 3 and VS of Jack E. Middleton at 8-9;

Western Motor Tariff Bureau ("Western") at 7; Rocky Mountain and VS of Haney at 2; NMFTA/NCC, VS of Pugh at 11, 14-15, 18 and VS of Joel L. Ringer at 13-15. The proponents of these agreements conclude that since they have fully complied with all conditions previously imposed in the public interest, and since nothing has changed in the relatively short period since the Board's last approval, the agreements currently in place remain in the public interest and should remain approved. See Comments of Rocky Mountain at 5-6; Pac Inland at 2, 4; NMFTA/NCC "Argument" at 2; Middlewest at 2, 4; HGCB at 1-2, 11, 14.

Agreement Opponents

Individual shippers and shipper associations uniformly object to continued regulatory approval and antitrust immunity for these agreements. These parties assert that the agreements facilitate "stealth" rate increases, either by raising class rates or by changing commodity classifications, that small and medium size firms throughout the economy must and do compete without collectively setting prices, and that current conditions (such as high fuel prices and driver shortages) conducive to rate increases exacerbate the harm to shippers brought about by such agreements. See Comments of National Small Shipments Traffic Conference and National Industrial Transportation League ("NASSTRAC/NITL") at 4, 6, 11-12, 14-16. Shippers also aver that the classification agreements favor carriers by skewing commodities toward classes that reference a higher "benchmark" rate, by denying shippers the right to vote on classifications, and by other means. See Comments of NASSTRAC/NITL at 4, 13-15, 18.

If the STB is not disposed to disapprove the agreements outright, shipper parties urge the imposition of additional conditions. These conditions would directly restrain the use of benchmark rates (by mandating automatic discounts from those rates or by limiting collective ratemaking to the recovery of carrier costs) and would also provide for shipper voting on commodity classifications, among other things.

The Legal Standard

Motor carriers may enter into agreements regarding, *inter alia*, general rate adjustments based on average industry costs, classifications, and through routes and joint rates. 49 U.S.C. § 13703(a)(1). Such agreements may, but need not, be submitted to the Board, which may approve them if they are found to be "in the public interest." 49 U.S.C. § 13703(a)(2). [2] The STB must review previously approved agreements every five years, and "shall" change conditions or terminate approval altogether "when necessary to protect the public interest." 49 U.S.C. § 13703(c). Such agreements shall continue until the Board "determines otherwise." 49 U.S.C. § 13703(c)(2).

It is thus clear that the "public interest" is the touchstone for the STB's consideration of motor carrier agreements like these. [3] The burden of showing that an agreement meets the public interest standard is on the party seeking approval and antitrust immunity. 2001 Decision, 4 S.T.B. at 507-08 ("[i]f [the rate bureaus] want

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[2]/ The Board may impose conditions to assure that agreements "further[] the transportation policy" set forth in 49 U.S.C. § 13101.

[3]/ The freedom of motor carriers not to submit agreements to the Board, the requirement that the STB review approved agreements no less often than every five years, and the straightforward statutory language above refute any argument that Congress has somehow established a presumption in favor of regulatory approval of the agreements at issue or that it supports their continued immunity from antitrust law. See Comments of NMFTA/NCC, VS of Pugh at 12-13 and "Argument" at 1, 3, 7.

immunity from the laws that govern private businesses in the free market ... they must demonstrate to us that immunity is in the public interest").

The supporters of the agreements at issue have not satisfied the statutory standard. Continued antitrust immunity denies the shipping public the full benefit of market forces enjoyed by consumers throughout the economy generally, and by shippers in other domestic sectors of the transportation industry specifically. Moreover, it also results in some members of the shipping public paying higher prices than they would in the absence of these agreements. Finally, continued approval and immunity is not necessary for the production of a standard classification system, joint service offerings, or any other pro-competitive collective arrangements.

Discussion

It is beyond dispute that throughout the American economy competition is the rule and antitrust immunity the rare exception. [4] Thus, those seeking such extraordinary protection from the laws that foster competition have a great burden. They must show that the public interest is better served by insulating their collusive activities from the free play of competitive forces than by exposing them to such forces. The proponents of the agreements at issue have not done so, and the conditions imposed to lessen the anticompetitive impact of those agreements do not serve the public interest as well as competition in the marketplace would. The agreements should therefore be disapproved.

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[4]/ Indeed, antitrust law is a fundamental economic policy, so even where immunity exists it is narrowly construed. See FMC v. Seatrain Lines, Inc., 411 U.S. 726, 733 (1973).

The Board conducted a comprehensive review of the subject agreements between 1997 and 2003. [5] In the course of those proceedings the STB made a series of findings fundamental to this case: that unconditioned collective rate-setting produces above-market "benchmark" rates, that discounts reduce the rates actually paid by many but not all shippers, and that joint line routes and rates do not require antitrust immunity. See 1998 Decision, 3 S.T.B. at 930-31, and note 16; 2000 Decision, 4 S.T.B. at 508-11. The Board also found that a national classification system can help carriers to reduce costs and price their services efficiently. 1998 Classification Decision, 3 S.T.B. at 921-22. The STB then imposed conditions designed to (1) prevent shippers from paying above-market rates, and (2) ensure meaningful shipper participation in the classification process. 2001 Decision and 2003 Decision, and 2001 Classification Decision, all supra. [6]

The arguments of the rate bureaus in support of their agreements are not credible, whether as a matter of economics, antitrust law, or the record in this case. To contend that collectively set class rates facilitate price and service competition is to posit that discounts from above-market "benchmarks" ensure shippers actually pay only market-

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[5]/ 1998 Decision and 2000 Decision, both supra; EC-MAC Motor Carriers Serv. Ass'n, STB Section 5a Application No. 118 (Amendment No. 1), (STB served November 20, 2001) ("2001 Decision"); EC-MAC Motor Carriers Serv. Ass'n, STB Section 5a Application No. 118 (Amendment No. 1), (STB served March 27, 2003) ("2003 Decision"). In a companion proceeding the Board examined the related agreements by which carriers have established freight classification systems. Nat'l Classification Comm. – Agreement 3 S.T.B. 917 (1998) ("1998 Classification Decision"); Nat'l Classification Comm. – Agreement 4 S.T.B. 496 (2000) ("2000 Classification Decision"). In subsequent orders the Board passed upon amendments designed to implement its conditions. See, e.g., 2001 Classification Decision, supra; Nat'l Classification Comm. – Agreement, Section 5a Application No. 61 (STB served October 16, 2003) ("2003 Classification Decision").

[6]/ The "truth in rates" notice and "loss of discount" prohibition provide shippers with information about the range of rates offered by rate bureau members and prevent the imposition of "benchmark" rates on shippers in the event of late payment, respectively. 2001 Decision slip op. at 8-10; and 2003 Decision slip op. at 4-11. Shipper participation in the classification process was enhanced in order to address "a bias toward classification changes that overall result in rate increases." 2000 Classification Decision, 4 S.T.B. at 499. Id.

based rates. But that is contrary to the Board's prior findings that some shippers do pay above-market rates even with widespread discounting. It also flies in the face of the continued shipper opposition of record, which strongly indicates that the conditions imposed to reduce the anticompetitive consequences of discounted "benchmark" rates are not working.

This view is contrary as well to the logic pursuant to which horizontal competitors enter into price-fixing arrangements, which is to raise prices above the levels that would obtain in a free market. This is also why this activity is per se illegal without regard to justifications that might be advanced. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). Moreover, to characterize the current system as a competitive one that enjoys widespread shipper support is to ignore the opposition registered in the record by all participating shippers.

In addition, to suggest that small and medium size firms could not compete or would otherwise suffer a disadvantage without antitrust immunity, is to slight the countless small and medium firms throughout the economy competing against rivals of all sizes without such extraordinary protection. Finally, to tout the benefits of joint line rates and services, or the efficiencies of a classification system, yet express unwillingness to enter into such arrangements absent antitrust immunity not only misapprehends antitrust law, but also seeks to benefit from that professed ignorance. [7]

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[7]/ See, e.g., 1998 Decision, 3 S.T.B. at 931 note 15 ("any procompetitive services that the bureaus provide -- i.e., any services other than collective ratesetting -- do not violate the antitrust laws and thus do not require antitrust immunity");and Republic Airlines v. CAB, 756 F.2d 1304, 1317 (8th Cir. 1985) (it is not rational to expect significant lawsuits against procompetitive agreements).

In the past, the public interest dictated that all carriers -- motor, rail, air, and water -- should be subject to close regulatory oversight rather than competition and the laws designed to ensure that competition remains robust. That is no longer the case. In every segment of the domestic transportation industry Congress has passed laws and administrative agencies have issued rulings eliminating immunity and reinstating the marketplace as a superior guardian of the public interest. Every segment, that is, except this one.

The consumers of every other transportation mode are better served by competition among carriers than by regulatory conditions designed to offset departures from competition. In all other modes competitive forces have directly determined the services to be offered, the prices to be charged, and the "revenue needs" to be met. Consistent with antitrust law, uniform classifications, standards, and procedures have emerged or continued when they have proven beneficial; potential competitors have come together to agree upon the provision of joint services, and customers have proven adept at securing information about, and making choices among, the options available to them. [8] All without ongoing federal oversight of the type that continues here.

The supporters of the instant agreements have not shown that the public interest is so profoundly different here. The Board should acknowledge that motor carriage is not unique, and neither is the nature of the public interest with respect to competition.

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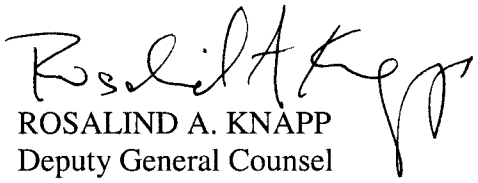
[8]/ Those carriers have done what the STB has suggested trucking firms do here in the absence of immunity: "set whatever rates they want, however they want to set them, subject to whatever laws will apply to their unimmunized conduct." 2000 Decision at 5. Consumers of their services likewise have known that "to determine the prevailing rate level [without collective rate levels] ... [they] need to comparison-shop by contacting other carriers for rate quotes" and they have done so. 2003 Decision at 5. In the age of the Internet, that is child's play.

Conclusion

Competition in the motor carrier industry, as elsewhere, will ensure a wide variety of price and service options, and the absence of antitrust immunity will not prevent continuation of truly beneficial joint arrangements. A policy favoring protection from the laws that preserve competition does not serve the public interest nearly as well as competition itself. Regulatory conditions designed to reduce or eliminate the consequences of anticompetitive activities -- in other words, to approximate free market results -- are inferior to outright disapproval of those activities. In short, the public interest here is best served as it has been in every other sector of the transportation industry. The Board should disapprove the rate setting and classification agreements at issue.

Respectfully submitted,



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April 1, 2005